



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 16, 1996

Ms. Laura McElroy
General Counsel
Board of Pardons and Paroles
P.O. Box 13401, Capitol Station
Austin, Texas 78711

OR96-0728

Dear Ms. McElroy:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39644.

The Texas Board of Pardons and Paroles (the "board") received a request for various information concerning pardons: the files of the seven individuals Governor Bush pardoned in August of 1995, the pardon applications of the individuals for whom pardon was denied in August of 1995, a list of the name, address, and phone numbers of the applicants who were denied pardon, a list of all individuals the board recommended for pardon, the files of the applicants the board recommended for pardon, a copy of the requestor's pardon application, portions of the requestor's pardon file, and any pardon request submitted after August, 1995 for which the board recommended the granting of a pardon. You inform us that the board provided the requestor a copy of a sample of an application for pardon, a list of the names, status, and date of denial for applicants for whom the board denied pardon in August of 1995, a list of the pardon applicants for whom Governor Bush denied pardon in August of 1995 and a list of the names, status, and date of pardon application for individuals the board recommended for pardon after August, 1995. You also inform us and the requestor that the pardon file of one of the pardon applicants whom Governor Bush pardoned is not in the custody of the board, but of the Texas Department of Criminal Justice ("TDCJ"), since TDCJ, rather than the board, maintains the files of present and former inmates.¹

¹We need not address in this ruling the public release of the file which TDCJ, rather than the board, possesses.

You assert that the pardon applications and recommendation letters of the six pardoned applicants, none of whom is an inmate, parolee, or person on mandatory supervision, are excepted from required public disclosure pursuant to section 552.101 of the Government Code.² This provision excepts from required public disclosure information that is made confidential by law, including information made confidential by statute. You assert that section 18(a) of article 42.18 of the Code of Criminal Procedure applies to the requested pardon files. That statute reads as follows:

(a) Except as provided by Subsection (b), all information, including victim protest letters or other correspondence, victim impact statements, lists of inmates eligible for release on parole, and arrest records of inmates, obtained and maintained in connection with inmates of the institutional division subject to parole, release to mandatory supervision, or executive clemency, or individuals who may be on mandatory supervision or parole and under the supervision of the pardons and paroles division, or persons directly identified in any proposed plan of release for a prisoner, is confidential and privileged.

By its terms, section 18 makes confidential information that concerns three categories of persons: (1) inmates of TDCJ's institutional division who are subject to parole, release to mandatory supervision, or executive clemency; (2) individuals on mandatory supervision or parole and under the supervision of TDCJ's pardons and paroles division; and (3) inmates identified in any proposed plan of release. You assert that although section 18 on its face applies to clemency records the board obtains and maintains in connection with TDCJ inmates, the legislature intended to include all clemency records within the protection of section 18. You aver that "[t]he exact same type of information is found in both the files in possession of the board and TDCJ as well as those held by the Governor pending his clemency decision in a case."

This office has applied the predecessor provision of section 18 to the board's pardon files, but only when such files concern an inmate. *See* Attorney General Opinion H-427 (1974); Open Records Decision No. 190 (1978); *see also* Code Crim. Proc. art 42.18 § 18(c) (permitting TDCJ to provide on request confidential information to board). We do not believe we can stretch the plain meaning of section 18 to apply it to the records of persons who are neither inmates nor individuals on mandatory supervision or parole and under the supervision of TDCJ's pardons and paroles division. Moreover, we believe that had the legislature intended to extend protection to the pardon records of

²In regard to the information concerning the six recently pardoned applicants, we note that the board has asked the requestor to clarify whether he seeks the entire pardon files. You inform us that the requestor has not responded to this request for clarification. We accordingly rule only on the pardon applications and the recommendation letters, as that is the only information you submitted to this office in regard to the first request.

individuals who are neither inmates, parolees, or individuals on mandatory supervision, it would have expressly done so. The language of a confidentiality statute controls its scope. Open Records Decision No. 478 (1987). A statutory confidentiality provision must be express; a confidentiality requirement will not be implied from the statutory structure. Open Records Decision No. 465 (1987). Consequently, as the pardoned applicants here are neither inmates, parolees, or individuals on mandatory supervision, we conclude that the requested pardon applications and recommendation letters are not made confidential by section 18 of article 42.18 of the Code of Criminal Procedure.

You also raise section 552.101 of the Government Code in connection with protecting the common-law privacy rights of the pardoned individuals. Section 552.101 applies to information made confidential by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and if the information is of no legitimate concern to the public. *See id.*

We agree that an individual's former and current salary, as well as the amount of child support paid, are protected from required public disclosure based on the common-law right to privacy. *See* Open Records Decision No. 600 (1992). In addition, one of the files contains private medical information that the board must not release. We have marked the information that the board may withhold from public disclosure. We do not believe the remaining information in the files is "highly intimate and embarrassing" or of "no legitimate concern to the public."

As for the social security numbers, we note that social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I) *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Open Records Act on the basis of that federal provision. We caution, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the board pursuant to any provision of law enacted on or after October 1, 1990.

You did not submit a representative sample of the information requested in the requestor's second request, the applications of individuals for whom pardon was denied.³ As you failed to submit representative samples of the information requested in the requestor's second request or otherwise to describe those files, we will assume that the files in the board's custody that concern applicants for whom either the board or the Governor denied the pardon in August of 1995 do not concern inmates, parolees or persons on mandatory supervision. Accordingly, the board may not withhold those files from the requestor under section 552.101 of the Government Code in conjunction with article 42.18, section 18(a). As these files may contain private information, we caution that the Open Records Act provides criminal penalties for the distribution of confidential information. *See* Gov't Code § 552.352.

You did not submit a representative sample of the information requested in the requestor's third request, the files of the applicants for whom the board recommended a pardon. You asked the requestor to narrow his third request, since it appears that the request is for all files since the year 1936. Apparently, the requestor has not responded to the board's request for clarification. You raise no exception to the release of this information. We believe the board may wait until the requestor responds to its request for clarification before releasing the information in the requestor's third request.

With regard to the fourth request, you inform us that you have released to the requestor a copy of his pardon application "and other information in his file," with the exception of an offense report and criminal history information the board received from the Texas Department of Public Safety. You raise section 552.108 in regard to the Houston Police Department offense report. Section 552.108 excepts from required public disclosure

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . [and]

(b) [a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . .

Gov't Code § 552.108. When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle*

³You also informed the requestor that the board denied applications for pardon in 14 cases, but that the board has custody of the files in five of those cases. You inform us and the requestor that of the 21 pardon requests the Governor denied in August of 1995, the board has custody of ten of the files.

Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how its release would unduly interfere with law enforcement or crime prevention. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.


We are not aware that the requested information relates to a pending law enforcement investigation. Moreover, we have no information from the Houston police department that explains how release of the requested information would unduly interfere with law enforcement. You apparently believe that as the suspect has served his sentence, the case appears to be closed. You say "the [b]oard has no information regarding an appeal of the case or whether there is currently any other investigation pending." However, we believe that the name of one of the police officers, which we have marked for your convenience, shows on its face that its release would unduly interfere with law enforcement or crime prevention. Accordingly, the board may withhold that name from required public disclosure pursuant to section 552.108 of the Government Code. The board must release to the requestor the remainder of the report.

We turn to the criminal history record information ("CHRI"). Title 28, Part 20 of the Code of Federal Regulations governs the release of CHRI which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential criminal history records that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain criminal history record information; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F.

As for the fifth request, "pardon requests submitted after August, 1995, which [the board recommended] and forwarded to the Governor's office," you say these files are not in the board's possession. You have advised the requestor to seek this information from the Governor's office.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Kay Guajardo". The signature is fluid and cursive, with the first name "Kay" written in a larger, more prominent script than the last name "Guajardo".

Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/rho

Ref.: ID# 39644

Enclosures: Marked documents

cc: Mr. Henry Charles Nannen, IV
2022 South Ellison Drive
San Antonio, Texas 78245
(w/o enclosures)